It’s inevitable – the Affordable Care Act (ACA) in its current form will most likely not survive 2017. Republicans are obligated to repeal the law and the House and Senate have already passed a number of procedural changes to allow for repeal to take place. We do know things will change – we just don’t know all the specifics.

In this report, we’ll take a step-by-step look at what we think will happen.
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BUDGET RECONCILIATION AND ACA REPEAL: HERE’S HOW IT CAN BE ACCOMPLISHED

The repeal effort begins with congressional budget resolutions.

The Senate has already passed a budget resolution that will shield repeal legislation from a Democratic filibuster and make a repeal effort easier. The resolution allows a simple Senate majority of 51 votes rather than a 60-vote super majority.

Many Republicans are already selling this budget resolution as an “Obamacare repeal resolution,” but it does nothing to the existing ACA bill. It’s a procedural move that will simplify repeal by ensuring that any future bill is immune to a filibuster.

Republicans have 52 Senate seats and a House majority, which effectively ensures no Democratic support will be necessary for repeal. The House has also passed a budget resolution with identical language – and neither it nor the Senate resolution requires presidential signature. However, replacing the Affordable Care Act is a different matter, which we’ll shortly explain.

Congressional Budget Resolutions DO:

- Shield repeal legislation from filibuster
- Allow a simple majority of 51 votes vs. super majority of 60 votes

Congressional Budget Resolutions DO NOT:

- Need Democratic support, since there’s a Republican majority
- Require presidential signature
REPEAL WITHOUT REPLACEMENT?
POLITICAL DIVISIONS AND INTEREST GROUPS
RAISE CHALLENGES

The easy part is over. The rest of the process is a steep uphill climb.

As Congress debated the recent budget resolutions, a significant divide within the Republican Party started to emerge. More than a few Republicans – in both the House and Senate – publicly pushed to slow down the repeal process.

Democrats voted against the budget resolution along party lines, meaning that just one or two Republican Senate defectors can crush any efforts. Among those voicing opposition to any repeal without a replacement plan include consumer groups, health-related interest groups, the American Medical Association (AMA), hospitals and governors from both parties.
HERE’S HOW REPEAL LEGISLATION WILL MOVE THROUGH THE PROCESS

Congress must decide what to repeal and whether to include replacement details.

When the budget resolutions are complete, Congress will need to tackle two issues. The first is the question of how much of the ACA do they want repealed, and the second is whether the repeal bill should include some provisions toward a replacement plan. Since no single committee is in charge of health policy, this is where it really gets complicated.

Committees Draft Repeal Bills
Each of four committees will draft a version of a repeal bill.

- House Energy and Commerce Committee
- House Ways and Means Committee
- Senate Finance Committee
- Senate Health, Education, Labor and Pensions Committee

Since each of these committees are headed by independent leaders, already significant obstacles are in the way of consensus.

Legislative Draft Will Seek the Fast Track
The legislation will be in the form of a reconciliation bill to allow for special fast-track procedures. Since Senate rules generally prohibit the use of reconciliation for measures that have no effect on spending or revenue, the legislative draft would most likely leave the most popular provisions of the health law intact. These might include the prohibition on insurers’ denying coverage to people with pre-existing conditions.

CBO Measures Impact
At this stage, the Congressional Budget Office (CBO) must be involved. The CBO will issue its estimates on how much any repeal bill will cost (or save), and how many people will gain or lose coverage.

Committees Work Together to Combine Drafts
Once each committee completes its draft, the merger process begins. The result will be one House bill and one Senate bill. As strongly as Republicans are committed to “repealing Obamacare,” they must also be committed to each other. As each committee continues their work, the GOP can ill afford to lose a single Republican Senator in either committee, since the overall Republican majority is narrow.
But repeal is not replacement. Here’s what could happen next.

A replacement bill will then need to be created and – unlike the repeal bill – it will most likely have provisions that do not have an impact on spending or revenue. If it does, it would then require a majority of 60 votes in the Senate.

Meanwhile, just as President Obama used executive actions to make changes to the law that did not require legislative approval, President Trump may also use executive actions to both undo what Obama approved and to make changes of his own. What these might be is the subject of broad speculation – with little consensus.
LET’S TAKE A LOOK AT THE ELEMENTS OF THE ACA THAT MIGHT BE AFFECTED BY A REPEAL

Since Budget Reconciliation will most likely be used, the repeal bill can only address those items that have an impact on spending or revenue. Let’s focus there first. Note that these examples indicate elimination of subsidies and/or tax credits, which provides savings to the government, a qualifier under the rules of budget reconciliation.

- Elimination of Medicaid expansion
- Elimination of tax credits and subsidies for public exchanges (but not the elimination of exchanges)
- Elimination of both individual and employment penalties (repeal legislation cannot eliminate the mandates, but can eliminate the penalties)
- Continued deferral or elimination of penalties associated with the “Cadillac Tax”
- Elimination of other miscellaneous taxes and fees:
  - Transitional reinsurance fees
  - Health Insurance Tax (HIT)
  - Increased Medicare taxes on higher incomes
  - Retiree drug subsidy
  - Small employer tax credit
- Restore the 7.5% threshold on tax deductions for medical expenses

Taxes and Fees Won’t Likely Change
Taxes and fees that the ACA imposed on high-income earners and on health insurers/drug manufacturers will most likely stay in place providing Republicans flexibility to fund any yet to be determined initiatives that may be proposed.

Implementation Delay Probable
In addition, it is widely speculated that any legislative draft might also delay the effective date between two and four years to avoid disruption to the marketplace as alternatives are developed.
These ACA features must stay the same – at least for the immediate future.

We’ve considered what can be changed by reconciliation, but what cannot be immediately impacted is equally important. This includes:

- Ban on pre-existing conditions, guaranteed issue and rescissions
- Unlimited annual and lifetime maximums
- Minimum essential benefits including preventive coverage and maximum out-of-pocket limits
- Employer reporting requirements (but penalties for non-compliance can be waived)
- Children to age 26 coverage on a parent’s plan
- Changes to Medicare Part D
- Premium review and minimum loss ratio requirements
- Age rating rules for small groups
- Wellness incentives
- Healthcare exchanges (but subsides maybe reduced or eliminated)

Republicans are being urged to slow down as opponents raise their voices.

With so much at risk, many don’t want to see the ACA repealed without a replacement plan, so Democrats and marketplace are calling for Republicans to slow down. Republican leadership has countered by indicating that many provisions of the repeal plan won’t take effect for two to four years so that there is little risk of market disruption.

But as opposition continues to grow, we are already seeing “replace” being turned into “repair” with the initial speed of the process being slowed to take a more calculated approach.

Two immediate questions are:

1. Will the House and Senate have enough votes to achieve a simple majority to approve an appeal bill?
2. If so, will the Senate be able to gain 60 votes to approve a replacement plan?

While the latter is doubtful, even a simple majority for repeal may not occur.
**Repeal without immediate replacement poses risks to the industry and the insured.**

Then what happens? Experts are nearly unanimous in their opinion that repealing the ACA without a clear plan to replace it could create havoc in insurance markets.

Without an effective mandate – and without subsidies to purchase insurance – many healthy people would most likely go without coverage knowing that they could buy it when they need it. The cumulative effect of these events would cause rates to skyrocket even higher. That is, of course, if any carriers are still willing to participate.

**WHAT MIGHT A REPLACEMENT PLAN LOOK LIKE?**

Attention now turns to what a replacement plan (or repairs) might look like. To be able to achieve a 60-vote supermajority in the Senate, such a plan will need to be carefully crafted.

Various members of Congress, the National Association of Health Underwriters (NAHU), as well as many consumer-interest groups have all been making various proposals of their own – with most proposals having many common elements.

**What could change?**

Some of the provisions that are being proposed under the various plans include:

- Elimination of minimum essential benefits, which would permit consumers to purchase less expensive plans offering fewer benefits
- Dismantling public exchanges and allowing individuals and small businesses to create new markets by forming associations
- Allowing the purchase of coverage across state lines
- Medicaid expansion might be replaced by providing block grants to states allowing them to take over more control
- The individual mandate and employer mandate might go away – but the underwriting risk is significant unless replaced with a “continuous coverage requirement”
- Elimination of insurers “medical loss ratio” requirements
- Eliminating mandates, which would mean all reporting requirements would disappear
In addition, these ideas are being discussed:

### Affordability

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Any new bill would most likely incorporate subsidies or tax credits to help defray the cost of premiums

### Authority Shift

States could be given more authority to set insurance standards, and the federal government would have less

### High-Risk Provisions

Republicans have discussed the idea of state-run “high-risk pools” for people with pre-existing conditions who would otherwise have difficulty finding affordable coverage

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**What might stay the same?**

Many of the original ACA’s insurance reforms would most likely prevail. These include pre-existing exclusion bans, waiting periods, coverage of children to age 26, community rating and unlimited annual and lifetime maximums.

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**WHY A REPLACEMENT PLAN IS NOT LIKELY TO BECOME A REALITY (AT LEAST NOT RIGHT AWAY)**

Is a replacement plan on the immediate horizon? The short answer is probably not. Republicans aren’t anywhere close to a consensus on what this replacement would look like. They’re even more undecided on the timing and the legislative strategy for trying to pass a replacement.

A replacement effort seems likely to stall. If it does, both the House and the Senate would likely push for rule changes, which would divert their attention from working together on a viable replacement plan. Many key Republican Senators seem uninterested in making such changes.

In the end, the repeal and replacement of Obamacare will be an incredibly complex and likely an incredibly lengthy task. There’s no guarantee of success, but the risk of “non-action” is too great.
The Winners Under a Replacement Plan

Let’s assume that we get this far and a viable replacement plan emerges. Who become the winners and losers?

**Certain Consumers**
Some of the biggest winners in a replacement plan scenario might be those who were hit hardest by the ACA: individuals who don’t currently qualify for subsidies. Many exchange consumers were insulated from high prices through tax credits, but those with incomes too high to qualify for subsidies have had to pay full premium prices.

A replacement plan would most likely lower premiums for healthier consumers by eliminating most provisions for minimal essential coverage. Many proposals discuss an expansion of tax credits. The difference is that they are not based on income as they are today, but on age. This means consumers who didn’t get subsidies under the ACA – because they make too much – might now get tax credits to pay for insurance premiums.

**Insurers**
Insurers would also be big winners under a replacement plan, since it will now become much more attractive for them to participate. Though most proposals maintain some protections for consumers with pre-existing conditions, they also cut a number of insurance regulations that will, theoretically, improve profitability for insurance carriers. Elimination of minimum essential benefits is also beneficial for insurers as plan designs would be based on what the market wants – at a price they would buy it.

**Brokers**
The third winner would be general agents and brokers. A more attractive market would most likely emerge with the expected elimination of the current “medical loss ratio” provision. Even if commissions never return to pre-ACA levels, most insurers would again start paying commission in the individual market, as they no longer would try to avoid attracting new consumers as a more profitable market emerges.
The Losers Under a Replacement Plan

Consumers with Current Subsidies
First, those who were getting the largest subsidies would lose the most. The ACA provided the most benefit to the poor – many people with low incomes were eligible for large subsidies, making health coverage very affordable at just $25 or $50 per month. If Republicans move forward with their plan to link tax credits to age instead of income, many of today’s subsidies would disappear. Although this might make sense since younger consumers have fewer health needs, it ignores many other issues of financial equity regardless of health status. A replacement plan may have the most negative effect on sicker and lower-income consumers.

Hospitals and Other Providers
The industry just went through major disruptive changes and dismantling the ACA would put hospitals and other providers right back where they started. The hospital industry has spent the last six years evolving many of their business models and operational practices to meet the requirements of the ACA. Repealing the ACA, particularly with no replacement in place, would likely cause turmoil for the provider segment. The AHA published a study in December 2016 estimating that repeal would double the uninsured rate by 2026, costing hospitals $165.8 billion.
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PREDICTING WHAT COMES NEXT

We’ll most likely see a repeal bill with many of the repeal provisions being delayed up to four years. After that, it’s anyone’s guess. Even if a four-year delay is built in, how will carriers respond? Will they stick around or head for the exits? Recent reports show that the 2017 skyrocketing rate increases were a one-time event and stability has returned to the market. Is it too little, too late?

The likelihood of a 60-vote, filibuster-proof majority based on the current plan being floated is unlikely. Cost will continue to be a challenge and access to coverage will persist under any proposal.
The information supplied in this document is for informational purposes only. You and your client should consult with qualified Healthcare Reform personnel before making any decisions concerning ACA related issues.